Filed 8/2/10 P. v. Ramirez CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE RAMIREZ, Defendant and Appellant.	B219145 (Los Angeles County Super. Ct. No. KA1086917)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Ramirez appeals from a judgment after a jury convicted him of one count of unlawfully driving or taking a vehicle without consent of the owner. (Veh. Code, § 10851, subd. (a).) We affirm.

FACTS AND PROCEDURAL HISTORY

On May 18, 2009, at approximately 4:30 p.m., Los Angeles County Sheriff's Deputy Darren Blackmer pulled appellant over for speeding in a silver 1991 Honda Accord. After running the vehicle license plate number, he discovered the car was stolen and arrested appellant. Detective Blackmer recovered a keychain with a key and a C.V.S. pharmacy card from the vehicle's ignition. There was no damage to the vehicle's door locks or ignition.

The next day, during an interview with detectives Mike Gil and Ron Greene, appellant said his "Homey" let him borrow the car. He told detectives the car was initially running when he got in but his friend turned it off, took a key from the keychain and restarted the car with a master key. Appellant admitted that he thought the car was stolen because his friend used a master key to restart the vehicle and he knew his friend "steals cars." Detective Gil testified that the key recovered from the vehicle was a "master key," capable of starting numerous Toyota and Honda models from the late 1980's to early 1990's, including a 1991 Accord. Further, appellant said he had never seen his friend driving the car before that day.

On July 13, 2009, appellant was charged with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). It was alleged that he had two previous felony convictions and had not remained free from custody for five years following his most recent conviction. (Pen. Code, § 667, subds. (b)-(i); § 667.5, subd. (b); § 1170.12, subds. (a)-(d); § 1203, subd. (e)(4).) It was further alleged that he had previously been convicted of grand theft cargo. (Pen. Code, § 666.5.)

At trial, the defense did not call any witnesses. During closing arguments the prosecution displayed a PowerPoint slide entitled "Facts Proven at Trial." The slide had

separate columns for facts established by the prosecution and defense. In the "prosecution" column there were four bullet points based on witness testimony: (1) "Raul Cerros's car is stolen;" (2) "Deputy Blackmer sees defendant driving stolen car; Master Key in ignition;" (3) "Defendant admits to Detective Gil that 'Homey' steals car & started it with 'Master Key';" and (4) "Defendant had prior intent and knowledge of how to steal without the original key, without damaging the locks, without damaging the ignition." In the "defense" column, the only things listed were: (1) "Only Speculation," and (2) "No Hard Evidence."

Defense counsel objected to the slide, arguing the title made it appear that the defense had the burden of proving certain facts. The court concluded the slide was simply argument but asked defense counsel to address any potential *Griffin* error.[1] Counsel did not comment directly on *Griffin* error, indicating he had already made his record about the improper burden shifting. In overruling the objection, the court stated, "I don't think the prosecutor is commenting in any way, shape, or form on the defense not testifying. Other witnesses could have been called . . . . [¶] Second . . . I don't think that it suggests, other than just a very, very remote potential extrapolation, that the defense has any burden of proving in this particular case." The court admonished the jury before deliberation, reminding them that counsel's arguments were not evidence; "[t]he evidence is what they heard and saw."

On September 1, 2009, the jury found the defendant guilty of unlawful driving or taking of a vehicle (Veh. Code, § 10851(a)). Defendant waived his right to a court or jury trial on his prior convictions and admitted all allegations as true. The court imposed, and doubled, the upper term of four years, pursuant to Penal Code section 666.5 and defendant's prior strike, and one year was added for each of defendant's two prison priors pursuant to Penal Code section 667.5. Defendant was sentenced to a total term of 10 years.

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1 *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

DISCUSSION

A. The Prosecutor Did Not Engage in Prejudicial Misconduct

In *People v. Redd,* the California Supreme Court explained, " ' " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.]' " ' " (*People v. Redd* (2010) 48 Cal.4th 691, 733.) " 'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." ' " ' " (*Id.* at p. 734.) A "prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Benmore* (2000) 22 Cal.4th 809, 846.) " ' " 'The [prosecutor's] argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.) In order to " 'preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm.' " (*People v. Redd, supra,* at p. 734.) The objection must be made on the same ground upon which the defendant assigns error. (*Ibid.*)

While respondent correctly points out appellant never explicitly objected to the PowerPoint slide for prosecutorial misconduct in the trial court, the "burden shifting" objection that appellant did make addressed a form of misconduct that is the basis for what he is arguing on appeal. As a result, we disagree that appellant's claim is forfeited. However, we find no misconduct.

The mere fact that the slide was titled "Facts Proven at Trial" and had a column for facts "established" by the defense does not, in and of itself, suggest that the prosecutor was placing any burden of proof on the defense. In reality, the slide appears to have simply been the prosecutor's comment on the evidence that was presented. In

fact, the prosecutor was fairly candid with the jury about the burden of proof when he said, "If I've proven these three elements, you must find the defendant guilty. If I did not prove any one of these three elements, you must find the defendant not guilty. That's the rule." Since this comment clearly articulates that the burden of proof rests with the prosecution, it is unlikely jurors would have understood the slide as imposing a burden on appellant to respond to each of the prosecution's so called "facts proved at trial."

Additionally, the court's jury instructions made it clear the prosecution had the entire burden of proving appellant's guilt. The trial court instructed the jury that appellant was presumed innocent and did not have to present any evidence to prove his innocence. The imbalance of facts that existed on the slide was a direct result of the defense's lawful right to put the prosecution to its burden of proof, not from a deceptive practice or misconduct by the prosecution. Each bullet point was either a recap of the testimony or a reasonable inference or deduction drawn from it.

B. Use of the PowerPoint Slide did not Constitute Griffin Error

Griffin, supra, 380 U.S. 609, forbids any reference to a defendant's failure to take the stand in his defense. Here, defense counsel claims the prosecutor violated *Griffin* because the PowerPoint slide listed facts that only he could have refuted which indirectly commented on his failure to testify. We disagree

We first observe that defense counsel did not avail himself of the court's invitation to assert *Griffin* error. Although arguably any error is therefore waived on appeal, because of the constitutional rights implicated, we address the *Griffin* contention on the merits. A prosecutor's argument that points out the absence of defense evidence does not necessarily suggest *Griffin* error. "A prosecutor is permitted . . . to comment on a defendant's failure to introduce material evidence or call logical witnesses." (*People v. Brown* (2003) 31 Cal.4th 518, 554.) In this case, the slide did not comment on appellant's failure to testify since there were other witnesses that could have been called to refute the prosecution's case. As the trial court pointed out, appellant could have called an auto expert, his "homey", or a person from the C.V.S. pharmacy to provide

factual support for his position. Presumably these witnesses could have discussed the condition of the car's door locks and ignition and what might have been presented to appellant when he got into the car. Certainly his confederate could have testified about the circumstances surrounding the event, and someone from C.V.S. may have been able to identify the owner of the card found on the key ring. Additionally, appellant could have presented testimony regarding common police practices as it relates to recording admissions and interviews since he made an issue about it at trial. If appellant thought the police had failed to do things that typically would have been done as part of a police investigation, he could have presented his own evidence to support this contention rather than merely address it on cross examination. For whatever reason, appellant presented nothing in his defense; the PowerPoint presentation simply commented on the state of the evidence as it existed, not that appellant should have testified.

C. *Any Resulting Error Would Have Been Harmless*

Here, the evidence presented at trial established that: Raul Cerros's car was stolen; Deputy Blackmer pulled appellant over for speeding in Cerros's stolen Honda; appellant admitted to detective Green that he thought the car was stolen and he knew it had been started with a master key; and appellant was involved in a prior similar incident occurring in 1995.[2] The defense called no witnesses to refute what was said by the prosecution and presented no evidence to show that appellant did not commit the charged offenses. Given the overwhelming evidence of appellant's guilt, and assuming any error was of federal constitutional dimension, we are satisfied beyond a reasonable doubt that appellant would not have received a more favorable outcome but for the prosecution's PowerPoint slide. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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2 Appellant admitted this allegation as true.

DISPOSITION

The Judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.